IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

NO. 79-445

ANTHONY BARRAZA,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

TABLE OF AUTHORITIES

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The State of Georgia, by and through the Attorney General of Georgia, respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Georgia Court of Appeals' decision in this case. That opinion is reported at 149 Ga. App. 738, 256 S.E.2d 48 (1979).

QUESTION PRESENTED

Did Petitioner properly present his present contentions, as to allegedly ineffective assistance by counsel at trial and on direct appeal, to the highest court of the State of Georgia, so as to invoke the jurisdiction of this Court?

STATEMENT OF THE CASE

In addition to the procedural history of this case set forth at page 3 of the petition, Respondent submits the following additional information in order to clarify the record before this Court. Attached to this brief as Appendix A is a copy of Petitioner's Motion for Rehearing, filed in the Georgia Court of Appeals on April 18, 1979.

Petitioner did not raise the allegation of ineffective assistance of counsel until the filing of the Motion for Rehearing in the Georgia Court of Appeals. As asserted in the petition, Petitioner's trial attorney filed a direct appeal in Petitioner's behalf and argued that the evidence was insufficient to support the guilty verdict. Petition, page 8. Contrary to the assertion in Petitioner's brief, however, Petitioner's trial attorney also enumerated as error the trial court's action in recalling the jury for additional instructions. That issue was also rejected by the State Appellate Court. Petition, Appendix A3-A4.

Present counsel for Petitioner apparently entered the case on the Motion for Rehearing

filed in the Court of Appeals. Appendix A, hereinafter cited as M.R. In the Motion for Rehearing, present counsel argued, inter alia, that Petitioner had been denied the effective assistance of counsel at his trial and on appeal. M.R., pages 9-10.

The Georgia Court of Appeals denied the Motion for Rehearing without written opinion, Petition, Appendix B, and the State Supreme Court denied a writ of certiorari. Petition, Appendix C.

REASONS FOR DENYING THE WRIT

BECAUSE PETITIONER DID NOT RAISE HIS CONTENTION THAT HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL UNTIL HIS MOTION FOR REHEARING IN THE GEORGIA COURT OF APPEALS, AND BECAUSE NEITHER THE COURT OF APPEALS NOR THE GEORGIA SUPREME COURT CONSIDERED THE MERITS OF THE CONSTITUTIONAL CLAIM, THIS COURT SHOULD REFUSE TO GRANT A WRIT OF CERTIORARI.

Petitioner concedes that his constitutional claims with respect to the assistance rendered by his attorney were not presented to the Georgia Court of Appeals in the brief filed in that Court by his attorney. Petition, page 8. A proper and timely presentation of a federal question in the State courts is a jurisdictional pre-requisite to review by this Court. 28 U.S.C. § 1257(3); Beck v. Washington, 369

U.S. 541, 550-54 (1962). Petitioner presumably relies upon his belated presentation of this issue in his Motion for Rehearing in the Georgia Court of Appeals. M. R., pages 9-10. In denying Petitioner's Motion for Rehearing, the Court of Appeals issued no opinion. Petition, Appendix B.

This Court has specifically held that, under these circumstances, a federal constitutional issue has not been properly presented to the State courts so as to invoke this Court's jurisdiction on a writ of certiorari. Stembridge v. Georgia, 343 U.S. 541, 547 (1952). "At this stage, the Supreme Court of Georgia could have denied certiorari on adequate State grounds. Where the highest court of the State delivers no opinion and it appears that the judgment might have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment." Id. (Emphasis by the Court). Similarly, raising a federal question for the first time in a Petition for Rehearing addressed to the highest State court is insufficient, unless the Court actually entertained the petition and expressly decided the question. See Radio Station WOW, Inc. v. Johnson, 326 U.S. 120 (1945); Herndon v. Georgia, 295 U.S. 441 (1935).

Sub judice, the Georgia Court of Appeals denied the Motion for Rehearing without opinion, and the Georgia Supreme Court denied a petition for writ of certiorari without opinion. The federal questions, with respect to Petitioner's claim of ineffective assistance of counsel, were

not raised in a timely or proper manner.

This Court should thus conclude that the federal questions raised in this petition were neither presented to or passed upon by the Georgia Courts. As in Cardinale v. Louisiana, 394 U.S. 437 (1969), this Court does not have jurisdiction to consider the issues raised by Petitioner. Particularly applicable to Petitioner's case is Cardinale's discussion of the reasons for dismissing the writ of certiorari over and above the statutory limitations of 28 U.S.C. § 1257. Id. at 439.

The Cardinale opinion noted the importance of allowing State Courts the first opportunity to consider constitutional issues upon an adequate record. The Court then summarized the pertinent factors in support of the decision to dismiss the writ:

> ". . . the petitioner's admitted failure to raise the issue he presents here in any way below, the failure of the State Court to pass on this issue, the desirability of giving the State the first opportunity to apply its statute on an adequate record, and the fact that a federal habeas remedy may remain if no State procedure for raising the issue is available to petitioner . . ." Id.

With respect to the last factor cited by Cardinale, the availability of habeas corpus relief, it is evident that Petitioner has

available to him a State and a federal habeas corpus remedy under Ga. Code Ann. § 50-127 (Ga. Laws 1967 p. 835 et seq., as amended). Petitioner may raise the issues asserted here before a State habeas corpus court with an opportunity for review by the Georgia Supreme Court. Should that remedy be inadequate or after unsuccessful application to the State Courts, Petitioner may then proceed through federal habeas corpus. In addition to providing an opportunity for the Georgia Courts to consider Petitioner's contentions as properly raised and upon a full record, the remedy of habeas corpus would provide Petitioner with the opportunity to be heard and present evidence on his allegations, including that of ineffective assistance of counsel.

In addition to Petitioner's contention that he was denied the effective assistance of counsel, the petition refers to a denial of due process because of a failure by the prosecution to prove all of the elements of the offense. Petition, page 2. The Georgia Court of Appeals found the evidence against Petitioner to be sufficient. Petition, Appendix A3.

Even in the Motion for Rehearing filed by present counsel for Petitioner, the arguments as to the sufficiency of the evidence were not presented in terms of a federal constitutional violation. M. R., pages 2-4. Petitioner's counsel argued that the evidence was insufficient as a matter of State law.

It is thus apparent that Petitioner has not presented the specific federal constitutional question, pertaining to the insufficiency of the evidence, to the State Courts. In order to invoke this Court's jurisdiction, the federal right claimed must be asserted with specificity, and a mere reference to the "Constitution of the United States" has been held insufficient. Herndon v. Georgia, 295 U.S. 441, 442-43 (1935). Sub judice, Petitioner does not appear even to have suggested to the Georgia Courts that a federal constitutional claim was involved in his evidentiary contention.

In addition to the failure to properly raise this issue in the State Courts, Petitioner has failed to show any reason why this Court should grant certiorari to review the factual basis for his conviction. See U. S. v. Johnston, 268 U.S. 220, 227 (1925). c.f. Thompson v. City of Louisville, 362 U.S. 199 (1960). If Petitioner has any valid claim stemming from a lack of evidence to support his conviction, his remedy lies in a federal habeas corpus proceeding. Jackson v. Virginia, ___ U.S. ___, 61 L.Ed.2d 560, 574-77 (1979).

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX "A"

IN THE COURT OF APPEALS OF
THE STATE OF GEORGIA

ANTHONY BARRAZA	*	FROM THE SUPERIOR COURT OF
APPELLANT,	*	MUSCOGEE COUNTY, GEORGIA
VS.	*	CASE NO: 57454
STATE OF GEORGIA	*	
APPELLEE	*	

MOTION FOR REHEARING

Attorneys for Appellant

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IN THE COURT OF APPEALS OF

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ANTHONY BARRAZA	*	FROM THE SUPERIOR COURT OF
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VS.	*	CASE NO: 57454
STATE OF GEORGIA	*	
APPELLEE	*	

MOTION FOR REHEARING

Comes now the Appellant in the above styled matter within ten days of the rendition of judgment by this Honorable Court in said matter with this his Motion for Rehearing and respectfully shows as follows:

(Writer's note: On April 18, 1979, the Appellant in this case walked into my law offices to ask me if I would review his case. He had been informed by his previous attorney that his appeal had been lost and that he should report to jail on the 19th of April, 1979. After reviewing the Clerk's record, the trial transcript, Enumeration of Errors (?), the Brief of Appellant and this Honorable Court's decision, I can frankly state that I am somewhat indecisive on what steps to take.

I do not have the time that this Motion for Rehearing deserves or that is necessary to conform it to even an average written brief. To compound the problem, some errors that should have been raised in the notice of appeal - would normally be considered waived at this juncture.

In short, I feel I should deviate somewhat from the normal rules of Appellate procedure, and in particular, the guidelines concerning Motions for Rehearings, in an effort to protect what is left of this individual's appeal).

1.

In Division 1 of the Court's decision dated April 9, 1979, Appellant submits that this Honorable Court has perhaps overlooked some aspects in the "general grounds" (Enumeration of Error #Number One) that would have meant a different result in this case.

For the record, Appellant again asks this Court to reconsider the evidence, in that a great majority of it was not legally sufficient evidence. Rutland v. State 46 Ga. App. 417. Furthermore, Appellant submits that there appeared no where in the record aliunde proof sufficient to establish prima facie the fact of a conspiracy between the parties. See Caldwell v. State 227 Ga. 706.

More important, however, is the fact that the verdict and judgment of the Court go hand in hand, and the "evidence" which produced the first, naturally is responsible for the second. In short, the defendant herein was convicted of theft by taking (Ga. Code Ann. 26-1802, Acts 1978, pp.2257,2258, eff. July 1, 1978-which was charged by the trial judge to the jury at T-78),and was sentenced as for a felony (3 years at T-82).

However, the testimony during the trial, as to "value", was insufficient to authorize a finding that the cash register had any value, much less that it exceeded the misdemeanor amount. (T-6)

In the indictment (R-4-5), the value of the cash register was alleged to be exactly $200.00. The owner testified "Well, I think it was worth about $200.00" (T-6). There was no other evidence of value, the cash register itself was not in Court, and this testimony was admitted without objection. This testimony was insufficient to authorize a finding that the cash register had any value.

Notwithstanding this, the defendant was tried on August 22, 1978, and convicted and sentenced on the same day. Appellan submits that under Ga. Code Ann. 26-1812(a) (Acts 1968,pp.1249, 1295;1972 pp. 841,842; 1978, pp.1457,1458 eff. July 1, 1978), he should have, at the worst, been punished as for a misdemeanor Even taken at face value, the testimony did not reveal that the subject of the theft "exceeded $200.00 in value."

On the other hand, if this Court decides that Acts 1978, pp. 1457, 1458 eff. July 1, 1978, does not apply here, but rather the former exception of $100.00 in subsection (a) does, then Appellant submits that the testimony (T-6) was insufficient to authorize a finding that the value of the theft was more than $100.00.

As it was stated in the case of Dotson v. State, 144 App. 113 (2)(240 S.E.2d.238):

> "(2) 2. The value of the pistol was alleged to be in excess of $100. The police officer testified that while he was unfamiliar with current prices, the value of the pistol was in the 'neighborhood of $200'; and that he purchased it three years ago for $160.00. There was no other evidence of value. This testimony was admitted without objection. In Hoard v. Wiley, 113 Ga. App.328,147 S.E.2d 782, it was held that an owner of property may not testify as to his opinion of the value of the property without giving his reasons therefor and an opinion as to value based solely on cost price is inadmissable in evidence

> as it has no probative value; and if admitted without objection it cannot support a verdict. This testimony thus is unsufficient to authorize a finding that the value of the pistol was more than $100. However, the evidence authorized a finding that the pistol was of some value which will authorize a conviction of theft by taking and sentencing as for a misdemeanor under Code §26-1802 and 1812, respectively. Crowley v. State, 141Ga. App. 867,234 S.E.2d 700. We affirm the conviction of theft by taking of property of some value but direct that the sentence for this offense be vacated and the defendant be re-sentenced as for a misdemeanor."

It is interesting to note that the co-defendant in this case, Castillo Sewell Rodrigo, who pled guilty to theft by taking, received a misdemeanor sentence on October 5, 1978. (R-5).

2.

Appellant respectfully submits that this Honorable Court has perhaps overlooked the real problem with the trial judge's "re-charge" regarding division 2 of this Honorable Court's opinion dated April 9, 1979.

Notwithstanding the fact that Appellant objects to the fact that the trial judge saw fit to charge the provisions of Code Section 26-801 relating to parties to a crime, when he had already charged on the law of "conspiracy", Appellant submits that at least the trial judge should have correctly charged Code Section 26-801 and should not have made a comment on the evidence or that particular charge after giving the same.

Appellant submits that the trial judge's comment:

> "Now, those are the definitions of a party - parties concerned in the commission of a crime and would be guilty, is the law. Does that answer your question, Mr. foreman?"

Is clearly an indication of his opinion on the evidence by that statement when that statement is viewed in the context from which it came. In other words, the jury had simply asked the Court whether the concept of accessory has any relevance to this case and then the foreman asked:

> "Specifically, if we were to conclude in our opinion that the defendant was an accessory to the crime, would that constitute a conclusion that he is guilty of the crime which he is charged." (T-79)

The District Attorney was kind enough to remind the Judge of the old "standby" (26-801) and the Judge gave them the answer, to-wit:

> "Parties concerned in the commission of a crime and would be guilty."

The Defendant objected to these answers (T-81).

Appellant submits that once the jury heard the trial judge's answers to their questions, they could draw no other inference other than that the Defendant was guilty.

Appellant submits that his right to have his guilt or innocence determined by an impartial jury was infringed upon by the trial court's statement. See Code Section 81-1104; Crawford v. State, 139 Ga. App. 347,348; also Alexander v. State 114 Ga. 266. Also see Griffin v. State, case number 53224

in the Court of Appeals of Georgia, decided April 7, 1977.

3.

Appellant herein submits that this Honorable Court perhaps overlooked the fact that error was committed when the Defendant's character was put in issue by the State (T-39,40)

As can be seen from the transcript, the District Attorney had asked the Defendant what his business or occupation was prior to his arrest (T-39). The Defendant answered that he was drawing unemployment but was starting to college. At this point, the District Attorney, with great emphasis, stated, "So, you were, not working".

After objection by the defense attorney, the District Attorney, ostensibly talking with the Court, testified to the jury:

> "I am trying to show, Your Honor, that we've got a man out there squiring around a young lady, who is out spending the money drinking liquor, and he needed to have some money come in from some where. It gives him a motive."

Appellant submits that although it is normally not error and that a defendant's character is not normally put in evidence by asking him if he works or where he works, Mitchell v. State, 236 Ga. 251, 256, this is not the usual question or comment to ascertain whether a defendant works or where he works.

As can be seen from the transcript, it is clear that the District Attorney was utilizing the Defendant's lack of employment (to which he had already testified seconds before by saying he was drawing unemployment)and was designed to do nothing more than prejudice the jury, put the Defendant's character into

evidence (drinking liquor) and was nothing more than improper argument and statements to the jury. Askew v. State, 135 Ga. App. 56,57; Ga. Code Ann. §81-1104.

4.

This Honorable Court, sua sponte, should grant a new trial simply on the basis of the testimony given during the State's case where it was implied that the primary witness for the State, Ms. Blackwell, had been intimidated and threatened by others, on behalf of the Defendant Barraza. (T-20,21,22,23,28 and 29). This testimony was totally irrelevant, untrue where Barraza was concerned, and rank hearsay (the Defendant was in jail). The authorities are too numerous to quote which hold that testimony of this nature and in this context, is impermissable This testimony was designed to do nothing but prejudice the jury against the Defendant Barraza, and even if the testimony was in fact true, there was no connection to Barraza, making it totally irrelevant in his case.

5.

Appellant submits that this Honorable Court, sua sponte, grant a new trial on the ground that the District Attorney, in an effort to impeach the Defendant Barraza, elicited testimony from one of his investigators that the Defendant Barraza remained silent at his preliminary hearing. (T-64). This was elicited by the District Attorney for no other reason than to either impeach the Defendant or submit it to the jury as evidence of guilt. This was error and Appellant submits that it should be considered by this Court. See Johnson v. State, 151 Ga. 21; United States v. Hale, 422 U.S. 71 (1975); Doyle v. Ohio, 426 U.S. 610 (1976).

Perhaps the most unusual aspect of this particular error is prior to the time that the District Attorney asked the investigator for his office if Barraza gave any testimony

at that hearing, and receiving a negative answer from the investigator, the District Attorney had, made the following statement: (at T-55)

> "DISTRICT ATTORNEY: Your Honor, excuse me, this man was a defendant just like this man, who has the same rights to remain silent. I object to him inferring any guilt from this man's exercise of his right to remain silent. If I did it on his client, it would be grounds for a mistrial.
> THE COURT: Yes. I sustain any objection, Mr. Davidson."

It is very interesting to note that the District Attorney, having already made a correct statement of the law on evidence of a defendant's silence (T-55), would then go ahead and elicit the same testimony he had objected to and the judge had sustained a question in regard thereto.

6.

Appellant submits that this Honorable Court, sua sponte, grant a new trial to this Appellant on the grounds that Count II of the indictment, dealing with theft by receiving certain eight track tapes, should have been stricken or hidden from the jury's view when the indictment went out with the jury for a verdict (R-4). The fact that the trial judge instructed the jury to ignore Count II of the indictment during its deliberations, does not obviate the fact that the first witness for the State of Georgia testified that these tapes were stolen about the same time as his cash register (T-5).

Although it wasn't objected to by the defense attorney who tried the case, it was certainly error, under the testimony given, to allow the jury to view and possibly read Count II

of the indictment. (Ga. Code Ann. §38-415; Bradford v. State 126 Ga. App. 688, 690 (4); Hess v. State, 132 Ga. App. 26,29 (3); Smith v. State, 237 Ga. 412 (1); Hill v. State, 236 Ga. 831,833; and see French v. State, 237 Ga. 620, 621.

7.

Appellant submits, that this Honorable Court, sua spo should grant Appellant a new trial on the basis of ineffective assistance of counsel at the trial of his case on August 22, 1978. See Powell v. Alabama, 287, U.S. 45. Also see Mitchell v. State, 229 Ga. 781; Hart v. State, 227 Ga. 171; and Williams v. Beto, 354 F2d. 698; Pitts v. Glass, 231 Ga. 636.

Appellant submits that his trial counsel, and the way his trial counsel handled his litigation in the court below, can best be summed up by a brief perusal of his original brief in this Court. This Court should note that its own opinion (all of two pages) is actually more lengthy than his Appellant's argument and citation of authorities. Furthermore, Appellant submits that his trial counsel erred when he failed to object to testimony that witnesses for the State were intimidated on behalf of the Appellant, (T-20,21,22,23,28,29) and generally that he did not pursue a number of errors on appeal which have been enumerated hereinabove, but which were not enumerated as errors on the original appeal. Appellant submits that should this Court deem that said counsel waived said errors, then this will support his contention that he was not effectively assisted in his case. Appellant submits not only was he ineffectively represented in the trial court, but also on appeal.

Appellant submits that there are many other instances of error committed by his own trial counsel during the trial and on appeal which are too numerous to include within the scope of this Motion for Rehearing. Appellant hopes that he has spotlighted some of the more glaring errors committed by

his trial counsel during the trial and on appeal and that this Court will recognize such representation for what it is and give this Appellant a new trial.

WHEREFORE, Appellant prays that this his Motion for Rehearing be filed and allowed and that the same be granted to Appellant for the reasons set out heretofore.

SWEARINGEN, CHILDS & PHILIPS, P.C.

BY: Ben B. Philips

Ben B. Philips

IN THE COURT OF APPEALS OF
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ANTHONY BARRAZA	*	FROM THE SUPERIOR COURT OF
APPELLANT	*	MUSCOGEE COUNTY, GEORGIA
VS.	*	CASE NUMBER 57454
STATE OF GEORGIA	*	
APPELLEE	*	

CERTIFICATE OF COUNSEL

Comes now Ben B. Philips, Attorney for Appellant, and states that upon careful examination of the opinion of this Honorable Court, he believes that the provisions of law and controlling authority have been erroneously construed and misapplied, and that the actual facts of the case have been misstated. Said Attorney further certifies that a copy of the Appellant's Motion for Rehearing has been served upon the opposing counsel in order that said opposing counsel may thereupon file a brief on the questions raised.

This the 18th day of April, 1979.

SWEARINGEN, CHILDS & PHILIPS, P.C.

BY: Ben B. Philips
Ben B. Philips

CERTIFICATE OF SERVICE

I, G. Stephen Parker, Attorney of Record for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court, I have this day served a true and correct copy of this Brief for Respondent in opposition upon the Petitioner by depositing a copy of same in the United States mail, with proper address and adequate postage to:

Mr. John C. Swearingen, Jr.
Attorney at Law
233 Twelfth Street
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Columbus, Georgia 31901

This 24th day of October, 1979.

G. Stephen Parker
G. STEPHEN PARKER